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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 7

SUSAN EPPERSON and H. H. BLANCHARD, *Appellants*

v.

STATE OF ARKANSAS, *Appellee*

On Appeal From the Supreme Court of Arkansas

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES AND THE NATIONAL SCIENCE TEACHERS ASSOCIATION AS AMICI CURIAE

PHILIP J. HIRSCHKOP
COHEN, HIRSCHKOP & HALL
110 North Royal Street
Alexandria, Virginia 22313
Attorney for the National Education Association of the United States and the National Science Teachers Association

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INDEX

	Page
Statement of Interest	1
Statement of the Case	4
Argument	5
I. Academic-Teaching Freedom and the Freedom of Inquiry are Fundamental Rights Guaranteed by the First and Fourteenth Amendments	5
II. The Freedom of Inquiry is a Constitutionally Guaranteed Right Coexisting and Intertwined with Academic-Teaching Freedom	15
III. Academic-Teaching Freedom and the Freedom of Inquiry Require the School and the Community to Present to the Student a Balanced Presentation of all Subjects Discussed in the Classroom and to Insure all Responsible Opinions Are Voiced and Argued	20
IV. The Arkansas "Anti-Evolution" Statutes Violate the Establishment Clause of the First Amendment of the Constitution	22
Conclusion	25

CITATIONS

CASES:

Adler v. Board of Education, 342 U.S. 485 (1952) ..8, 9, 26
Aptheker v. Secretary of State, 378 U.S. 500 (1964) .. 19
Barenblatt v. United States, 360 U.S. 109 (1959) ..6, 13, 14
Bolling v. Sharpe, 347 U.S. 497 (1954) 19
Burstyn v. Wilson, 343 U.S. 495 (1951) 24
Cumming v. Richmond County Board of Education, 175 U.S. 528 (1899) 7

Page

Everson v. Board of Education, 330 U.S. 1 (1947) 23
Illinois ex rel McCollum v. Board of Education, 333 U.S. 203 (1948) 23, 24
Kent v. Dulles, 357 U.S. 116 (1958) 19
Keyishian v. Board of Regents of New York, 385 U.S. 584 (1967) 15, 26
Lamont v. Postmaster General of the United States, 381 U.S. 301 (1965) 18, 19
Loving v. Virginia, 388 U.S. 1 (1967) 22
Meyer v. Nebraska, 262 U.S. 390 (1923) 7, 8, 17
NAACP v. Alabama, 357 U.S. 449 (1958) 19
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 18
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 8
Reynolds v. United States, 98 U.S. 145 (1879) 23
Rosenberg v. Board of Education of New York, 92 N.Y.S.2d 344 (1949) 17
Shelton v. Tucker, 364 U.S. 476 (1960) 14, 15
Sweezy v. New Hampshire, 354 U.S. 234 (1957) ..12, 13, 14
Torcaso v. Watkins, 367 U.S. 488 (1961) 23
West Virginia State Board of Ed. v. Barnette, 319 U.S. 624 (1942) 14, 24
Wieman v. Updegraff, 344 U.S. 183 (1952) 9, 10, 11, 14
Zorach v. Clauson, 343 U.S. 306 (1952) 24

STATUTES:

Ark. Stats. Ann. § 80-1627 and § 80-1628 (1928) 4, 5

OTHER AUTHORITIES:

American Association of University Professors, Preamble, Statement on the Academic Freedom of Students, 51 A.A.U.P. Bull. 447 (1965) 17
American Civil Liberties Union, Academic Freedom and Academic Responsibility 5 (1962) 15
Beale, Are American Teachers Free? (1936) 18
Bible, Book of Genesis, Chapter I 22
Comment, School Board, School Books and the Freedom to Learn, 59 Yale L.J. 928 (1950) 16, 19

Page

Emerson & Haber, The Scopes Case in Modern Dress, 27 Chi. L. Rev. 522 (1960) 20, 21, 23

Greene, The Function of the School in A Modern Democratic Society, in Emerson, Haber & Dorsen, Political and Civil Rights in the United States, 902, 3d ed., (1967) 18, 25, 26

Keebler, Limitations Upon the States' Control of Public Education: A Critical Analysis of State of Tennessee v. Scopes, 6 Tenn. L. Rev. 153 (1928) 15

Leflar, Legal Liability for the Exercise of Free Speech, 10 Ark. L. Rev. 155 (1955) 23

Mack Iver, Academic Freedom and Academic Responsibility, Newman, The Freedom Reader, 2d ed. (1958) 20

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Reutters, The Law and the Curriculum, 20 Law & Contemp. Prob. 91 (1963) 15

Sharp, Science, Religion and the Scopes Case, 27 Chi. L. Rev. 529 (1960) 16, 25

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STATEMENT OF INTEREST

This brief *amici curiae* is being filed by the National Education Association of the United States (NEA) and the National Science Teachers Association (NSTA) with consent of the parties as provided under Rule 42 of the Rules of this Court.

The National Science Teachers Association, a department of the National Education Association of the United States and an affiliate of the American Association for the Advancement of Science (hereinafter referred to as NSTA), is a non-profit corporation duly organized and existing under and by virtue of the laws of the District of Columbia. It is an independent voluntary organization affiliated as a department of the National Education Association. NSTA is composed of approximately 20,000 members, nearly all of whom teach science and science-related subjects in American elementary schools, junior and senior high schools and colleges and universities. Some sixty-five state, local or regional science teacher organizations are affiliated with NSTA. Over 100,000 high school students annually participate in Future Scientists of America programs carried on by NSTA. The stated objects and purposes of NSTA are:

> To stimulate, improve and coordinate science teaching at all levels of instruction and to engage in any and all activities in furtherance thereof; to promote the improvement of educational systems and processes in the schools in any manner to assist such stimulation and coordination of science teaching; to apprise the general public of possible means of improving science teaching within the schools; and generally to do any and all acts and things which may increase, through education, the knowledge of science devolving upon the general public and the betterment of the general public through such knowledge of science.

The National Education Association of the United States (hereinafter referred to as NEA), is an independent, voluntary, non-governmental organization of educators who live and work throughout the United States. The NEA is related to the teaching profession

of this country somewhat as the American Medical Association is to the medical profession and the American Bar Association is to the legal profession. For over a century, the NEA has been the most representative voice of the teaching profession in America. Its purpose, as chartered by Congress in 1906, remains:

> To elevate the character and advance the interests of the profession of teaching and to promote the cause of popular education in the United States.

The NEA enrolls the majority of teachers of the United States, having a membership, including student teachers, of over one million individual members. Included are teachers, supervisors and administrators, representing all levels of instruction, nursery school through university, from private, public and parochial schools. There are more than eight thousand local, state and territorial education associations affiliated with the NEA.

The interest of the NEA in this case derives from the fact as stated in its platform that:

> The National Education Association exists to advance the cause of education.
>
> Education is the daily practice of great ideals: that every person bears within himself a promise which can and must be realized; that all persons are entitled to respect and dignity; that freedom of thought, of expression, of movement, and of religious belief belongs to all persons; that liberties entail obligations. Education is fundamental to the realization of these ideals.
>
> Education is essential also to the strength and well-being of the society. The public school is the indispensable source of national unity, common

purpose, and equality of opportunity. Educated citizens are the resource through which the society has the power to survive and flourish. . . .

The purpose of the National Education Association is to give effect to these beliefs.

STATEMENT OF THE CASE

The State of Arkansas, in 1928, adopted two statutes, Ark. Stats. Ann., §§ 80-1627 and 80-1628, which in effect made it unlawful for any teacher in any state supported elementary or high school, or university to teach or adopt any textbook which makes reference to the Darwinian Theory of Evolution that mankind ascended or descended from a lower order of animals. The statutes provide:

> *Section 80-1627.* DOCTRINE OF ASCENT OR DESCENT OF MAN FROM LOWER ORDER OF ANIMALS PROHIBITED.—It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals, and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.
>
> *Section 80-1628.* TEACHING DOCTRINE OR ADOPTING TEXTBOOKS MENTIONING DOCTRINE.—PENALTIES.—POSITIONS TO BE VACATED.—Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act (Secs. 80-1627, 80-1628) by teaching the theory or doctrine mentioned in Section 1 (80-1627) hereof, or by using, or

adopting any such textbooks in any such educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars ($500.00); and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member.

Appellant Susan Epperson, a biology teacher in Little Rock Central High School, Little Rock, Arkansas, was furnished the prescribed textbook which contained chapters on the theories of the evolution of man, omitting, however, the Darwinian Theory. Desirous of fulfilling her responsibility as a teacher and properly teaching her subject, but confronted with these 1928 statutes, Miss Epperson, joined later by H. H. Blanchard, a parent of two minor children, who intervened in this action, sought a declaratory judgment in the Chancery Court of Pulaski County, Arkansas, that the Arkansas "anti-evolution" statutes were unconstitutional and in violation of their First and Fourteenth Amendment rights. On May 27, 1966, the Chancery Court held these statutes unconstitutional. (See Appendix A.) This was reversed Per Curiam by the Supreme Court of Arkansas on June 5, 1967. (See Appendix B.)

ARGUMENT

I. ACADEMIC-TEACHING FREEDOM AND THE FREEDOM OF INQUIRY ARE FUNDAMENTAL RIGHTS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS

The state generally has broad police power regarding the establishment and control of its public school system. However, it cannot be disputed but that the exercise of this police power must be reasonable and

not arbitrary, and that it may not infringe upon rights guaranteed by the Constitution and the Bill of Rights.

The Darwinian Theory of evolution is commonly recognized as a fundamental scientific principle. Resting on "a multitude of discoveries of very different kinds, that concur and complement one another," it has therefore been "accepted into man's general body of knowledge by scientists and by other reasonable persons who have familiarized themselves with the evidence." Statement signed by 179 biologists. (See Appendix C.) It is clearly an infringement of academic freedom to deny the teaching of so common and popularly accepted a theory as this.

Academic-teaching freedom and the freedom of inquiry are fundamental rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and must be fully protected. These Arkansas statutes which are neither in furtherance of any legitimate state interest, nor reasonably related thereto, arbitrarily infringe upon the exercise of the aforementioned rights. They cast a pall of orthodoxy over the students and teachers in the classroom and have a chilling effect upon the exercise of fundamental First Amendment rights of open and unrestricted academic inquiry and study. "When academic-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion . . . into this constitutionally protected domain." *Barenblatt* v. *United States*, 360 U.S. 109, 112 (1959). The National Science Teachers Association and the National Education Association firmly believe that these Arkansas statutes represent such an intrusion and should be ruled unconstitutional.

Traditionally, school boards, operating on a state and local level, have a great deal of discretion in determining the content of the school curriculum. While it was recognized that the Constitution and the Bill of Rights represented limitations on the state's power in its operation of the school system, the precise extent of such limitations remained for a time, undefined. See *Cumming* v. *Richmond County Board of Education*, 175 U.S. 528, 545 (1899).

One of the major limitations on the state's power, however, was set forth by the Supreme Court in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) wherein a state law which forbad the teaching of any language other than English to any child who had not passed the eighth grade was held unconstitutional. Holding this law violative of the Fourteenth Amendment of the Constitution, the Court stated:

> *The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted.*... Plaintiff in error [a teacher] taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment. 262 U.S. at 400 (emphasis added).

Continuing, the Court stated: "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain *fundamental rights* which must be respected." 262 U.S. at 401 (emphasis added). Thus the Supreme Court in 1923 took judicial notice of what was to clearly be recognized in the future as the fundamental rights of academic-teaching freedom and its corollary freedom of inquiry.

Two years later in *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925) the Supreme Court again entered the field of education and state control, striking down an Oregon statute requiring every parent to send his child, between the ages of eight and sixteen, to a school operated by the state. The Court, in holding this statute unconstitutional and in violation of the due process clause of the Fourteenth Amendment, followed the doctrine laid down in *Meyer* v. *Nebraska, supra,* reaffirming the right of parents to direct the upbringing and education of their children and the right of teachers to teach.

Thereafter, the doctrine of academic freedom and the freedom of inquiry received little judicial notice until 1952, where the Supreme Court in a split decision in *Adler* v. *Board of Education,* 342 U.S. 485 (1952), sustained a New York statute requiring that persons employed in New York public schools or state colleges take an oath of allegiance. Justice Douglas vigorously dissented, objecting to the New York law because of its great potential for stifling intellectual pursuit. Recognizing the need for freedom of thought and inquiry in the academic community and asserting their fundamental character, he noted that the Constitution, "guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher." 342 U.S. at 508.

He further stated, "The public school is in most respects the cradle of our democracy. . . . . [T]he impact of this kind of censorship on the public school system illustrates the high purpose of the First Amendment in freeing speech and thought from censorship." 342 U.S. at 508. Such a statute, he noted, could have no

other effect than to stifle academic freedom and the exercise of the free intellect, and to frustrate any pursuit of knowledge.

> The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin. . . . A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction. The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued wherever they lead. We forget these teachings of the First Amendment when we sustain this law. *Adler, supra,* at 510-511 (Douglas J., dissenting).

The following term, in what has become a landmark case in the area of academic freedom, the Supreme Court in *Wieman* v. *Updegraff,* 344 U.S. 183 (1952), unanimously ruled unconstitutional an Oklahoma statute requiring all state employees to take an oath that they had not been members of any subversive organization listed by the Attorney General of the United States. The Court based its decision on the fact that the statute made no distinction between innocent and knowing membership and that under the statute, membership standing alone was sufficient grounds for condemnation. Such a statute was unquestionably violative of the due process clause of the Fourteenth Amendment.

Justice Frankfurter, in a concurring opinion, approached the statute from a different point of view.

Regarding the effect of the Fourteenth Amendment he stated: "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling." *Wieman, supra* at 195. In what remains today as one of the most poignant statements on behalf of academic-teaching freedom and the freedom of inquiry, Justice Frankfurther proceeded to define this Constitutional privilege stating:

> But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. 344 U.S. at 195.

Forecasting the effect of such a statute upon the educational process, Justice Frankfurter further noted:

> Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. *It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice* . . . . 344 U.S. at 195 (emphasis added).

Reminiscent of the philosophy of the "market place of ideas" of John Stewart Mill, Justice Oliver Wendell Holmes and others, Justice Frankfurter further explored society's need for academic freedom and the freedom of inquiry. "Public opinion is the ultimate reliance of our society only if it can be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical in-

quiry are required in the formative years of our citizens." 344 U.S. at 196.

This discipline of open-mindedness and critical inquiry, however, can be developed only in an educational environment which pays full respect and tribute to the freedoms of speech, inquiry and association:

> To regard teachers—in our educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. *It is the special task of teachers to foster those habits of open-mindedness and critical inquiry* which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their functions by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. *They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas* . . . . They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedom of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government." *Wieman, supra* at 196-197 (Frankfurter J., concurring) (emphasis added).

Clearly, what was threatened by this Oklahoma statute was not merely the freedom of speech. Academic-teaching freedom and the freedom of inquiry represent separate and distinct rights guaranteed by the First Amendment and any statute threatening to infringe

upon this practice represents a violation of the First Amendment and the due process clause of the Fourteenth Amendment.

In *Sweezy* v. *New Hampshire,* 354 U.S. 234 (1957) where a state contempt conviction based on a one-man legislative investigation into subversive activities in New Hampshire was overturned, the Court specifically recognized the existence of academic freedom as a fundamental constitutional right. Emphasizing the fundamental need for academic-teaching freedom and freedom of inquiry, the Court stated:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straightjacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation .... Scholarship cannot flourish in an atmosphere of suspiscion and distrust. *Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.*" 354 U.S. 250 (emphasis added).

Responding to the allegation that fear and confusion might be generated by the unorthodox, the Court admonished: "Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society." 354 U.S. at 251.

To the State's argument that this one-man investigation was a justifiable exercise of the state's police power, Justice Frankfurther asserted that: "When weighed against the grave harm resulting from *govern-*

mental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lectures appears grossly inadequate," *Sweezy, supra* at 262 (Frankfurter J., concurring) (emphasis added).

In *Barenblatt* v. *United States,* 360 U.S. 109, 112 (1959), where the Court affirmed a contempt conviction of a teacher who refused to testify before a Congressional Committee, Justice Harlan writing for the majority nevertheless stated that:

> When *academic teaching-freedom and its corollary learning-freedom,* so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. (emphasis added).

In the same case Justice Black, dissenting, asserted that one cannot consider the government's demand for self-preservation without recognizing the need in the academic community for experimentation, the exposing of points of view, and the privilege of making mistakes. 360 U.S. at 144-146. Recognizing society's need for an unrestricted forum for the exchange of ideas, he reasoned that:

> . . . the only constitutional way our Government can preserve itself is to leave its people the fullest possible freedom to praise, criticize or discuss, as they see fit, all governmental policies and to suggest, if they desire, that even its most fundamental postulates are bad and should be changed; 'Therein lies the security of the Republic, the very foundation of our constitutional government.' 360 U.S. at 145-146.

Quoting from *West Virginia State Board of Ed.* v. *Barnette*, 319 U.S. 624 (1942) he continued:

> *'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.* 360 U.S. at 148 (emphasis added).

The following term the Court, in *Shelton* v. *Tucker*, 364 U.S. 476 (1960), overturned an Arkansas statute which required public school and state college or university personnel to file an affidavit listing all organizations to which they belonged at the time or during the past five years. Reasserting the need for academic-teaching freedom and the freedom of inquiry, the Court stated that: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." 364 U.S. at 487. Quoting from *Sweezy, supra*, the Court again recognized that "Teachers and students must always remain free to inquire, to study and to evaluate . . . ." 364 U.S. at 487. And in this area of academic-teaching freedom and the freedom of inquiry, "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." 364 U.S. at 489.

In light of such cases as *Wieman, Sweezy* and *Shelton, supra*, it is beyond question but that academic-teaching freedom and the freedom of inquiry are fundamental rights endowed with a constitutional dignity which cannot be denied. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding . . . ." *Sweezy, supra* at 250. "The vigilant protection of con-

stitutional freedoms is nowhere more vital than in the community of American schools." *Shelton, supra* at 487.

Diffusion of sound learning is vital to the success and progress of any society. Keebler, *Limitations Upon the States' Control of Public Education: A Critical Analysis of State of Tennessee* v. *Scopes*, 6 TENN. L. REV. 153, 175 (1928); Reutters, *The Law and the Curriculum*, 20 LAW & CONTEMP. PROB. 91 (1963) "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian* v. *Board of Regents of New York*, 385 U.S. 584, 603 (1967). This fact in and of itself would seem to demand that the highest respect be paid to academic-teaching freedom and the freedom of inquiry.

II. THE FREEDOM OF INQUIRY IS A CONSTITUTIONALLY GUARANTEED RIGHT COEXISTING AND INTERTWINED WITH ACADEMIC-TEACHING FREEDOM

Academic freedom has been defined as:

> . . . the liberty and obligation to study, to investigate, to present and interpret, and to discuss facts and ideas concerning man, human society and the physical and biological world in all fields of learning. . . . [It implies] no limitations other than those imposed by generally accepted standards of art, scholarship and science. AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM AND ACADEMIC RESPONSIBILITY 5 (1952).

The state of Arkansas would argue that even though academic freedom and the freedom of inquiry may be endowed with the constitutional dignity of a First Amendment right, this factor in and of itself does not render the state educational system immune from rea-

sonable regulation by the state in accordance with its police powers.

In this respect, two factors must be explored. First, it is not the contention of this brief nor is it in issue, that the State has no function in the operation of the educational system. Certainly state control is necessary in the organization and operation of the school system. Unquestionably, reasonable regulation is essential in maintaining discipline on school property and measurably contributes to order and decorum within the educational system. What is, however, in issue is whether the State may exercise unbridled control over what shall be taught in the classroom and whether the State shall have the absolute power to decide what facts, information and issues will be presented to the students, or whether there exists certain constitutional limitations on the exercise of such power.

While absent specific constitutional provisions a state may fail to provide public education, it does not necessarily follow that the state may furnish a system of public education which violates the federal Constitution. "The doctrine of unconstitutional conditions has many applications in our law, and it is enough to dispose of the simple argument based on a state's freedom to avoid undertaking any public education." Sharp, *Science, Religion and the Scopes Case,* 27 CHI. L. REV. 529, 533 (1960). Furthermore, "by placing education under the aegis of its constitution, the State assumed the vital obligation of guaranteeing to all child-citizens the free exercise of their 'largest natural ability.'" Comment, *School Boards, School Books and the Freedom to Learn,* 59 YALE L.J. 928, 946 (1950).

Regarding the state's absolute control over the curriculum, the Supreme Court, on an occasion where it specifically dealt with this problem in *Meyer* v. *Nebraska, supra,* recognized the existence of such limitations when it ruled unconstitutional a state statute prohibiting the teaching of any language other than German to children below the eighth grade.

Confronted with a similar problem, a New York appellate court in *Rosenberg* v. *Board of Education of New York,* 92 N.Y.S.2d 344, 346 (Sup. Ct. 1949), in refusing to grant an injunction seeking to remove certain books from school libraries, recognized the distinct necessity for academic freedom and the freedom of inquiry.

> Except where a book has been maliciously written for the apparent purpose of promoting and fomenting a bigoted and intolerant hatred against a particular racial or religious group, public interest in a free and democratic society does not warrant or encourage the suppression of any book at the whim of any unduly sensitive person or group of persons . . . .
>
> Educational institutions are concerned with the development of free inquiry and learning.

It has been repeatedly pointed out that free inquiry and expression are essential attributes to academic freedom and the freedom of inquiry, and that freedom to learn depends upon "appropriate opportunities and conditions in the classroom. . . ." American Association of University Professors, *Preamble, Statement on the Academic Freedom of Students,* 51 A.A.U.P. Bull. 447 (1965). In this vein, it is clear that academic freedom includes the freedom of inquiry which requires that "all responsible opinions on controversial issues

are voiced and argued—and so do the freedoms of speech and assembly in a democracy." Greene, *The Function of the School in A Modern Democratic Society*; in EMERSON, HABER & DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, 902, 906 (3d ed. 1967). See also Beale, Are American Teachers Free? (1936) wherein it is stated that "'Teachers should have the privilege of presenting all points of view, including their own, on controversial issues without danger of reprisal by the school administration or by pressure groups in the community." *Id.* at 701.

A more precise understanding of the freedom of inquiry and the students' right to be presented with all responsible points of view on a given issue, may be achieved through an examination of the Court's approach to a problem in an analogous constitutional area. In *Lamont* v. *Postmaster General of the United States*, 381 U.S. 301 (1965), the Supreme Court adjudicated the validity of a federal statute requiring a request in writing as a prerequisite for the forwarding of non-sealed mail from abroad containing propaganda material. In ruling this statute unconstitutional, the Court explored the right of a person to receive such printed material and held that the statute:

> . . . amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment Rights. . . . [It] is at war with the 'unhibited, robust, and wide open' debate and discussion that are contemplated by the First Amendment. *New York Times Co.* v. *Sullivan*, 376 US 254, 270; 11 L ed 2d 686, 700; 84 S Ct 710; 95 ALR2d 1421. *Lamont, supra*, at 307.

Justice Brennan, concurring in *Lamont*, pursued at greater length a person's First Amendment right to re-

ceive these publications. His discussion of these rights would seem to be most significant when considering the right of a student to have presented to him popularly accepted academic and scholarly arguments. Noting that the First Amendment contains no specific guarantees of access to publication, he remarks, however, that "the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful." *Lamont, supra* at 308. Citing as authority *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S. Ct. 693; *NAACP* v. *Alabama*, 357 U.S. 449, 78 S. Ct. 1163; *Kent* v. *Dulles*, 357 U.S. 116, 78 S. Ct. 1113 and *Aptheker* v. *Secretary of State*, 378 U.S. 500, 84 S. Ct. 1659, he continues:

> I think the right to receive publications is a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. *It would be a barren marketplace of ideas that had only sellers and no buyers.* 381 U.S. at 308. (Emphasis added).

While it may be argued that the freedom of inquiry involves the risk that a child might, in the midst of such freedom, gravitate toward the "wrong" idea and beliefs, "faith in democracy is predicated on the belief that *greater* benefits accrue from freedom, instead of suppression, of thought." Comment, *School Boards, School Books and the Freedom to Learn*, 59 YALE L. J. 928, 943 (1950) (emphasis added). The student, similarly to one entitled to receive printed matter, must have free access to all thoughts and ideas in order to insure development of a sound intellect and a democratic society.

III. ACADEMIC-TEACHING FREEDOM AND THE FREEDOM OF INQUIRY REQUIRE THE SCHOOL AND THE COMMUNITY TO PRESENT TO THE STUDENT A BALANCED PRESENTATION OF ALL SUBJECTS DISCUSSED IN THE CLASSROOM AND TO INSURE ALL RESPONSIBLE OPINIONS ARE VOICED AND ARGUED

Academic-teaching freedom and the freedom of inquiry are not claimed as luxuries of an academic guild, or as concessions granted by a government. They are professional freedoms, necessary and fundamental conditions to a free society, as are special areas of freedom granted to other professions in order to carry out their duties and properly serve their clients and patients. The elementary and secondary school teacher needs the fundamental freedom of the profession no less than does his colleague in the university or college, or the doctor or lawyer. Mack Iver, Academic Freedom in Our Time 9 (1955). See also Mack Iver, *Academic Freedom and Academic Responsibility*, NEWMAN, THE FREEDOM READER (2d ed. 1958).

In seeking to insure the teacher this academic freedom in the presentation of these ideas, and to insure the student and the community a forum wherein these ideas will be properly presented, Professors Thomas Emerson and David Haber, in an article in the Chicago Law Review, offer a test and guidelines as aids to the legislature, the courts and to society. They note that public education "involves a sector of communication which has many of the elements of a closed system, because of such elements as compulsory attendance laws, the large share of research funds, scholarships and grants, which tend to create a virtual government monopoly. They further note that "the government is assuming an affirmative function in the system of communication through public education." The au-

thors maintain therefore that, "Any such closed, or virtually closed, system of communication creates obvious issues for a democratic society which are not comprehended within the traditional principles of free speech applicable to an open or free-for-all system." Emerson and Haber, *The Scopes Case in Modern Dress*, 27 CHI. L. REV. 522, 526-527 (1960).

Recognizing the power of state and local governments to interfere with these First Amendment freedoms, but that the State does not have unlimited discretion in these areas of academic-teaching freedom and the freedom of inquiry to the exclusion of the mandates of the Constitution and the Bill of Rights, Professors Emerson and Haber suggest a standard which would, if followed, provide for a responsible educational system.

> Essentially the obligation of the government must be to present a fairly balanced exposition of various relevant theories and points of view, and of alternatives open for action. Only through enforcing a concept of this nature can individual members of society develop their full potential or exercise their sovereign right to govern themselves. *Id.*, at 527.

Under such an approach, theories within the area of recognized academic or scientific standards could not be omitted from the curriculum. The teacher would be obligated to present and the student would, as a matter of right, be entitled to be exposed to differing points of views and approaches. Under such an approach, academic-teaching freedom and the freedom of inquiry would serve the community, providing an atmosphere wherein theories and ideas would flourish and the marketplace of ideas would serve the purpose for which it was intended and so carefully protected by the First Amendment.

While it is within the state's authority to establish and control a public school system, any extension of this control into constitutionally protected areas such as academic-teaching freedom and the freedom of inquiry must be closely scrutinized. Any attempt by the state to curtail the presentation of a balanced approach must necessarily be in violation of the due process clause of the Fourteenth Amendment as an unreasonable and arbitrary exercise of its police power. Where the state seeks to abridge fundamental First Amendment freedoms it must bear the burden of proving by clear and convincing evidence the overriding state interest. *Loving* v. *Virginia,* 388 U.S. 1 (1967).

IV. THE ARKANSAS "ANTI-EVOLUTION" STATUTES VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OF THE CONSTITUTION

If, as the State claims, the Arkansas "anti-evolution" statutes do not represent an arbitrary and capricious exercise of the State's police power, but are, rather, reasonably related to the operation and control of the State's educational system, the obvious conclusion must be drawn that the only realistic function these statutes could possibly have is to isolate the general public and all students from any theory contrary to the Biblical doctrine of the "Divine Creation of Man." Taking a fundamentalist approach to Chapter 1 of the Book of Genesis, ("And God said, Let us make man . . . And the Lord God formed man . . . .") the Darwinian theory of evolution is in fact deemed by some to be contrary to the Bible. Therefore, any consideration of these Arkansas statutes must necessarily lead to the conclusion that they are designed to protect a particular religious doctrine or belief, and are incontrovertibly in violation of the "Establishment" clause of the First Amendment of the Constitution.

As explained by one author and student of these statutes:

> Public obscenity, blasphemy and profanity are made crimes primarily because of their tendency to incur breaches of the peace and disorderly conduct, but not for that reason alone. They are deemed socially objectionable in themselves . . . .
>
> . . . Although Arkansas does not punish blasphemy as such, the same ideological considerations underlie the anti-evolution enactment . . . but it is in fact likely to be a secondary reason, the primary one being a desire to safeguard established moral, social or religious mores against attacks of the sort prohibited. . . . Leflar, *Legal Liability for the Exercise of Free Speech,* 10 ARK. L. REV. 155, 158-159 (1955).

Clearly, the Arkansas legislature has sought to give State support to a particular religious belief, and definitely not to enact a measure dealing with any problem of secular education. Emerson & Haber, *The Scopes Case in Modern Dress,* 27 CHI. L. REV. 522, 523 (1960).

On this matter, the law is clear.

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person . . . to profess a belief or disbelief in any religion. *Reynolds* v. *United States,* 98 U.S. 145, 166 (1879); *Everson* v. *Board of Education,* 330 U.S. 1 (1947); *Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203 (1948); *Torcaso* v. *Watkins,* 367 U.S. 488 (1961).

The First and Fourteenth Amendments go beyond merely forbidding a national or state church. Their prohibitions extend to any impartial governmental as-

sistance of all religions. *Illinois ex rel McCollum* v. *Board of Education, supra* at 442.

Implicit in these Arkansas anti-evolution statutes is a legislative desire to perpetuate a particular religious doctrine. Such motives, however, cannot sustain these statutes, for "Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy to any class, creed, party, or faction." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 637 (1943). "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine . . . ." *Burstyn* v. *Wilson,* 343 U.S. 495, 505 (1951). The government, State or Federal, may, under no circumstances, use secular institutions to force one or some religion or religious belief on any person. *Zorach* v. *Clauson,* 343 U.S. 306 (1952).

Support for such anti-evolution legislation has, on occasion, been mustered on the grounds that this legislation is necessary to preserve a separation of church and state and an equilibrium in the classroom. It is argued that absent such legislation, the Darwinian theory of evolution representing one point of view regarding the "creation of man" may be offered in the schools, while another point of view, i.e., the "Divine Creation of Man" could not constitutionally be presented, thereby giving State support to a particular religious or atheistic doctrine in contravention to the precepts of the First Amendment. This syllogistic approach, however, has two significant flaws. First, it presupposes that the Darwinian theory of evolution is a religious or atheistic doctrine. Quite the contrary, it is purely a scientific theorum, neither atheistic nor theistic in scope, but merely offering one explanation

for the creation of man in his present form, and not necessarily antithetical to that explanation found in the Bible. The second flaw in the syllogism is that concepts of fairness and a balanced approach to the subject would require the doctrine of the "Divine Creation of Man" to be presented in the schools wherever the Darwinian theory is permitted to be taught. This argument loses sight of the constitutional requirement of separation of church and state. Furthermore, it ignores the fact that undoubtedly the doctrine of the "Divine Creation of Man" will continue to be taught in the home and in the church, thereby, insuring the preservation of the religious counter-argument, but limiting proliferation to its constitutionally proper forum—the church and the home.

Permitting these statutes to stand, therefore, clearly violates the "Establishment" clause of the First Amendment, and sanctions,

> Fraudulent oversimplification and the conceted use of myth or magic [which] serve neither the purpose of science nor the purpose of natural religion. Neither are they consistent with the policy of free and rational discussion which is indispensable for a democracy and implied by Constitutional provisions designed to protect the freedom of speech, [inquiry, or academic-teaching freedom]. Sharp, *Science, Religion and the Scopes Case*, 27 CHI. L. REV. 529, 534 (1960).

CONCLUSION

In a society dedicated to the principle of freedom, the school has the responsibility to teach men how and why to be free.

> The school is, par excellence, the well-spring of these higher freedoms since its special task is to make available man's wisest thoughts and beliefs,

> to extend his knowledge and deepen his spiritual insights, and, above all, to promote in all men the understanding of these highest freedoms and a passionate devotion to them. The school is thus the nurse and tutor, as government is the champion, of man's most precious rights—the rights without which man loses his human stature and becomes an animal, however well-fed, well-organized and well-protected he may be. *Greene, supra* at 905.

Accordingly, if we believe in the freedom of all men, the school must lead the way "by showing what it means to be intelligently and passionately concerned with the freedom of all men everywhere." *Greene, supra* at 907. "The public school is in most respects the cradle of our democracy." *Adler, supra* at 508. (Douglas J., dissenting). In this light, therefore, the Arkansas statutes in issue before this Court, can only be seen as a barrier to the true function and responsibility of education in the United States.

The State of Arkansas has seen fit to invade the system of education and dictate what facts and theories shall and shall not be taught, not only on the elementary and high school levels, but in the universities as well, placing a severe limitation on the classroom as the "market place of ideas." *Keyishian, supra* at 603.

It has ordained, under the guise of its police power and its right to regulate the school systems of the State, that it shall be illegal for one to teach or even to make reference to a fundamental scientific principle. In so doing, the state has imposed a straitjacket upon the intellectual leaders of our community. The State has thereby created a system wherein deadening dogma takes the place of free inquiry. Exercise of the free intellect and the pursuit of knowledge are frustrated

and stifled, and the constitutionally guaranteed right to academic freedom and the freedom of inquiry are mocked at and cast aside.

These statutes have an immediate and irreparable chilling effect upon the historic and traditional right of Americans to free thought and belief and will deter thousands of Americans from exercising these inalienable and indispensable rights. Their ultimate effect must be the placing of severe limitations on the free and unrestricted search for truth, which is the essential precondition for the functioning of a democratic society.

For the foregoing reasons it is respectfully submitted that the Judgment below should be reversed.

Respectfully submitted,

PHILIP J. HIRSCHKOP
COHEN, HIRSCHKOP & HALL
110 North Royal Street
Alexandria, Virginia 22313
Counsel for the National Science Teachers Association and the National Education Association of the United States, as Amici Curiae.